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Nos. 83-1075 and 83-1249

IN THE
Supreme Court of the United States
October Term, 1984

CENTRAL INTELLIGENCE AGENCY
and WILLIAM J. CASEY,
Director of Central Intelligence,
Petitioners-Respondents,
v.

JOHN CARY SIMS and SIDNEY M. WOLFE,
Respondents-Petitioners.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**RESPONDENTS' SUPPLEMENTAL BRIEF
ON THE CENTRAL INTELLIGENCE AGENCY
INFORMATION ACT**

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After respondents filed their brief on the merits, Congress amended the National Security Act of 1947, upon which petitioners rely to support their claim that the identities of the principal researchers and institutions involved in the Central Intelligence Agency's MKULTRA Program are exempt from disclosure pursuant to Exemption 3 of the Freedom of Information Act. This brief, filed pursuant to this Court's Rule 35.5, discusses the effect of the amendment, enacted as the Central Intelligence Agency Information Act, Pub. L. 98-477, on October 15, 1984.

The new legislation does not by itself dispose of the legal issues raised by this case, not only because it is not retro-

active, but also because it does not change the language of that portion of the National Security Act which is at issue here, 50 U.S.C. § 403(d)(3). However, the changes made in other parts of the statute, and the reasons given for those amendments, not only eliminate the public importance of this case on which the CIA relied in seeking certiorari, but also severely undermine the CIA's arguments by revising the context in which section 403(d)(3) must be construed.

As we more fully discuss below, the amendment affects this case in three respects. First, Congress has eliminated any basis for the "perception" argument upon which the CIA relies so heavily, Br. at 29-34, and which was advanced as the principal justification for the writ of certiorari. Petition at 8-12. Second, Congress has reaffirmed the critical importance of *de novo* judicial review in the implementation of the FOIA, even as applied to the CIA's most sensitive files. Finally, a review of the amendment's legislative history reaffirms that the "sources" Congress wishes to protect from disclosure are those whose willingness to participate depends on the CIA's protection of the confidentiality of their involvement — the very sources which are comprehended by the formulation of the court of appeals below. We discuss these effects of the Act in turn.¹

¹The legislative history consists of three committee hearings, three committee reports, and three floor debates, which occurred in the following chronological order. The Senate Select Committee on Intelligence held hearings on June 21, June 28 and October 4, 1983, S. 1324, *An Amendment to the National Security Act of 1947*, S. Hrg. 98-464 (1983) (here cited as "Senate Intelligence Hearings"), and issued a report on November 9, 1983. *Intelligence Information Act of 1983*, S. Rep. 98-305 (1983) (here cited as "Senate Intelligence Report"). The Senate passed its bill on November 17, 1983, following a debate reported at 129 Cong. Rec. S16742-S16746 (daily ed.). The Subcommittee on Legislation of the House Permanent Select Commit-

1. The most important consequence of the new legislation is to deprive the CIA of the policy argument on which its case is premised. According to the CIA, the very fact of judicial review under the court of appeals' formulation would cause the CIA's intelligence sources to perceive that the CIA could not protect their identities from disclosure; this perception, in turn, was said to interfere with the recruitment and retention of such sources. In support of the legislation that became Public Law 98-477, the Agency made the very same policy arguments to Congress that it has advanced in this Court — that the process of reviewing its files in response to FOIA requests caused the same perception problem and that that problem would be eliminated by passage of the CIA Information Act. However, as we show below, Congress not only did not agree that the perception argument was a serious one, but indeed decided that whatever problem existed would be eliminated by the bill. This problem, therefore, cannot be advanced as the guiding principle for construing section 403(d)(3).

tee on Intelligence held a hearing on February 8, 1984, *Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency* (here cited as "House Intelligence Hearing") and produced a report on May 1, 1984. *Central Intelligence Agency Information Act*, H. Rep. 98-726, Part 1 (1984) (here cited as "House Intelligence Report"). The Government Information, Justice and Agriculture Subcommittee of the House Committee on Government Operations held a hearing on May 10, 1984, *CIA Information Act* here cited as "House Gov't Ops. Hearing"), and issued a report on September 10, 1984. *Central Intelligence Agency Information Act*, H. Rep. 98-726, Part 2 (1984) (here cited as "House Gov't Ops. Report"). The House then passed H.R. 5164 on September 19, 1984, following a debate reported at 130 Cong. Rec. H9621-H9631 (daily ed.). The Senate acceded to the House bill on September 28, 1984, after a debate reported at 130 Cong. Rec. S12395-S12397 (daily ed.), and the President signed the Act on October 15, 1984. A copy of each of the Hearings and Reports has been lodged with the Clerk. All Congressional Record citations in this brief refer to the daily edition.

The origins of Public Law 98-477 lie in the Agency's efforts to obtain a complete exemption from the FOIA. Senate Intelligence Report at 7-8. However, Congress was unwilling to grant that request. To the contrary, it concluded that the FOIA plays a vital role in maintaining public confidence in our government, "particularly in agencies like the CIA." House Intelligence Report at 8-9. Thus, the CIA was forced to seek a narrower amendment — the exclusion of certain operational and related files from the process of search and review of records requested under the FOIA.

As enacted, Public Law 98-477 does not change the substantive standards for withholding any CIA records for which a search is required; instead, it exempts the CIA's "operational files" from the entire process. § 701(a). That term is given a precise definition to include only three separate categories of files found, respectively, in the Directorate of Operations, § 701(b)(1), the Directorate of Science and Technology, § 701(b)(2), and the Office of Security, § 701(b)(3). In addition, to assure that the exemption would not permit the Agency to conceal abuses of its authority, Congress provided that access to operational files would continue for requests by individuals for information about themselves, § 701(c)(1), for information relating to "special activities" (i.e., covert actions) whose existence is not exempt from disclosure, § 701(c)(2), and for matters which have been investigated by specific congressional or executive bodies for an impropriety or illegality. § 701(c)(3).²

²The Act does not apply to actions filed before February 7, 1984. § 4. Even absent this non-retroactivity provision, the records sought here would not be protected from disclosure because MKULTRA has been investigated by Congress and others, and thus comes within the exception in section 701(c)(3). In addition, files reflecting programs such as MKULTRA "do not meet [the bill's] definition of operational

The Agency presented several arguments in support of this proposal — (1) information in such files was rarely required to be disclosed after the process of search, review and application of FOIA exemptions for classified materials, as well as section 403(d)(3); (2) reviewing these highly sensitive records required experienced officers to be taken away from other tasks, and thus imposed a great administrative burden that could not be justified in light of the limited amount of information actually disclosed; (3) the administrative backlog created by the need for extreme care in the search and review process for operational files produced two to three year delays in responding to FOIA requests; and (4) sensitive files had to be exposed to FOIA reviewers who otherwise had no reason to see them. House Intelligence Report at 9-17; Senate Intelligence Report at 10-11. These arguments were received sympathetically by the Congress.

A fifth argument was presented by the CIA in support of the legislation, and in fact was touted as the most compelling reason for passage. In many respects tracking the arguments which it has advanced in this Court, the Agency argued that the FOIA process had damaged the CIA's ability to recruit intelligence sources and to elicit cooperation from foreign intelligence services. See House Intelligence Hearing at 11-12; Senate Intelligence Hearing at 6-8, 12-13. Quoting from the partial dissent of Judge Bork

files." 130 Cong. Rec. H9623 (Sept. 17, 1984). Indeed, the CIA explicitly agreed that the MKULTRA files would not be covered by the Act. See CIA analysis of categories of documents revealing CIA research programs at universities, Categories C24, C27 and C39, House Intelligence Hearing at 117-118, 124-125 (acknowledging that such documents are not "operational files" and are otherwise not exempted by the legislation). Thus, even if the search and review in this case had not already been conducted, the amendment would not enable the CIA to refuse to process respondents' request under the Act.

in this very case (*see* Pet. App. 13a), the CIA's representatives contended that the process of search and review created a perception on the part of many intelligence sources and intelligence services that the CIA could not provide them with an ironclad guarantee of confidentiality. Senate Intelligence Hearing at 13. According to the Agency's Deputy Director, despite the fact that intelligence sources are not in fact identified under the FOIA, "the key point is that those sources . . . have an entirely different perception." Senate Intelligence Hearings at 7. By eliminating search and review of operational files, he concluded, the legislation "will do away with the perception that a number of our sources have that they are threatened because of the present FOIA Act." *Id.* at 20. Moreover, the CIA, through its principal spokesman on the bill, Deputy Director John McMahon, guaranteed that the legislation resolving the problem was so satisfactory that the Agency would not seek further relief from the FOIA. *Id.* at 24-25; Senate Intelligence Report at 8; 130 Cong. Rec. H9631 (Sept. 17, 1984) (Rep. Mazzoli).³

Although the CIA's other claims were largely accepted, Congressional reaction to the CIA's perception argument was decidedly tepid. The intelligence committees of both the House and the Senate found that any perception

³Congress was fully aware both of the decisions of the court of appeals in this case and of the CIA's displeasure with them, yet did nothing to amend section 403(d)(3) to eliminate the CIA's objection. For example, at the House Intelligence Hearing conducted more than two months after the Agency's petition for certiorari had been filed in this Court, both this case and the CIA's views about it were specifically discussed. Hearing at 22, 26. Yet not only did Congress make no changes in section 403(d)(3) or otherwise attempt to overturn the decision below; it also elicited a commitment from the CIA not to seek any further FOIA relief. Senate Intelligence Report at 8; House Intelligence Report at 8 n. 5.

problems of intelligence sources did not outweigh the public benefits of the FOIA:

In a free society, a national security agency's ability to serve the national interest depends as much on public confidence that its powers will not be misused as it does on the confidence of intelligence sources that their relationships with the CIA will be protected.

House Intelligence Report at 8-9; Senate Intelligence Report at 13. *See also* 130 Cong. Rec. S 12397 (Sept. 28, 1984).

Although the Senate Intelligence Committee had proposed a legislative finding acknowledging the perception problem as one of several reasons warranting passage of the legislation, Senate Intelligence Report at 2, ¶ 8, *see also id.* at 12 (relying on McMahon statement quoted *supra* p. 6), the House committees disagreed and the finding was deleted from the statute.⁴ As the House Intelligence Committee explained, "The Committee remains skeptical of the validity of the perception problem and

⁴The House committee reports must be regarded as more authoritative than that of the Senate committee. The Senate bill, S. 1324, was passed first, in 1983, and a substantially similar bill, H.R. 4431, was introduced by Representative Whitehurst, the ranking minority member of the House Intelligence Committee's Subcommittee on Legislation. House Intelligence Hearing at 1, 95-104. A substantially different version, H.R. 3460, was introduced by Representative Mazzoli, the subcommittee chairman. *Id.* at 1, 91-94. After the House Intelligence Hearing was completed, Representatives Mazzoli, Whitehurst and others introduced H.R. 5164, which embodied the Mazzoli bill and several amendments. House Gov't Ops. Hearing at 2-9. H.R. 5164 was endorsed by both House committees and passed by the House. The Senate then abandoned its own bill, which had been more favorable to the CIA, and passed the House bill without amendment. Because the House reports more closely track the bill that was ultimately enacted, they are more persuasive legislative history than the Senate report.

does not consider it to be a major factor" supporting the legislation. House Intelligence Report at 10. The House Government Operations Committee was even firmer: it concluded not only that the perception argument was flawed, but also that "the unwarranted perceptions of foreign intelligence sources about the operations of the FOIA do not provide justification for changes in the law." House Gov't Ops. Report at 8. And all three committees agreed that "enactment of H.R. 5164 will change whatever perceptions need changing." House Intelligence Report at 10. *See also* Senate Intelligence Report at 8 (bill sends a "clear signal to our sources . . . that the information which puts them at risk will no longer be subject to the [FOIA] process"); House Gov't Ops. Report at 8 (to the extent that sources are afraid, correction of perceptions is a welcome byproduct of the bill).

Having failed to persuade Congress that the "perception argument" poses a significant problem, and having obtained passage of amendments to the National Security Act by assuring Congress that the amendments would eliminate the need for further FOIA relief, the CIA's attempt to resuscitate the perception problem in its briefs to this Court should be rejected. Indeed, because the perception argument was the heart of the justification for certiorari, Pet. at 8-12, the writ should be dismissed because the case no longer presents an issue of substantial public importance.

2. In addition to eliminating the CIA's perception argument, the CIA Information Act undercuts another persistent theme of the Agency's arguments in this Court, to the effect that judicial review of Agency determinations of who is an intelligence source is inconsistent with the National Security Act. The CIA's initial position before the Senate Intelligence Committee was that there should be

no judicial review of the Agency's determinations about which of its files are "operational." Senate Intelligence Hearings at 23 (any kind of judicial review would defeat what CIA hopes to accomplish by the legislation). *See also id.* at 51-52. The Senate Committee rejected this extreme position and adopted a judicial review provision that combined *de novo* and deferential standards of review. Senate Intelligence Report at 3-4, § 701(e). By the time of the House Intelligence Hearing, the CIA had accepted the principle of some judicial review, but opposed *de novo* review. Thus, testifying before the House Intelligence Committee, CIA attorney Edward Page Moffett, one of the Agency's counsel in this very case, noted that under current law, a court could substitute its judgment for the CIA in deciding whether an individual qualified for protection as a source. Hearing at 26. CIA and other government witnesses argued that such *de novo* review should not apply to decisions made under the amendment. *Id.* at 34-38. The issue of the appropriate standard for judicial review was the thorniest issue during the deliberations of the House committees. House Intelligence Report at 32-36; 130 Cong. Rec. H9627 (Sept. 17, 1984) (Rep. Kindness). After devoting extensive consideration to this issue, the House committees reported a bill which retained in section 701(f) the same *de novo* review as currently required by 5 U.S.C. § 552(a)(4)(B), albeit with modified procedures for creating the record upon which review would be conducted. The CIA found this compromise acceptable.

Thus, just as Congress was not persuaded of the CIA's claimed need for a total FOIA exemption and of the significance of the perception problem, Congress rejected the CIA's attack on *de novo* judicial review. To the contrary, Congress concluded, just as it had in 1966 when the FOIA was passed, and in 1974 when the Act was amended to overrule *EPA v. Mink*, 410 U.S. 73 (1973), "that *de novo*

judicial review is essential to ensure effective CIA implementation of the [FOIA] and to maintain public confidence in the implementation of the Act." House Intelligence Report at 32-33; Senate Intelligence Report at 43-44. *See also* 130 Cong. Rec. H9623 (Sept. 17, 1984) (Rep. Boland) ("the cornerstone of FOIA review and . . . the bedrock of review under H.R. 5164"), H9628 (Sept. 17, 1984) (Rep. Whitehurst). Surely, if *de novo* judicial review is required even with respect to "these most sensitive operational files," 129 Cong. Rec. S16743 (Nov. 17, 1983) (Sen. Goldwater), it is equally necessary in deciding whether the participants in a declassified program of scientific research are "intelligence sources" within the meaning of section 403(d)(3).

3. The hearings and reports which produced the CIA Information Act undermine the Agency's arguments in still another respect, by making it clear that the "intelligence sources" whom Congress wishes to protect do not include the sort of scientific researchers whose identities are at issue in this case. To the contrary, the legislative history of the CIA Information Act, just like the legislative history of the National Security Act cited by the CIA in its brief, contains no hint that these researchers qualify as intelligence sources. Instead, it is replete with references to the problems of "agents in the Soviet Union [and] in other parts of the world," House Intelligence Hearing at 16, to "our allies and individuals abroad who risk their lives," House Intelligence Hearing at 3, to "those who risk their lives and livelihoods," 130 Cong. Rec. S12396 (Sept. 28, 1984) (Sen. Goldwater), to "foreign sources," House Gov't Ops. Report at 8, and to "CIA sources abroad." Cong. Rec. H9629 (Sept. 17, 1984) (Rep. Stump). *See also* House Intelligence Report at 20-21 ("sensitive human and technical intelligence activities"). Thus, whatever the precise scope of the term "intelligence

sources" may be, it surely does not encompass the domestic scientific researchers who conducted the MKULTRA program, or the universities at which the research was performed.

CONCLUSION

For these reasons, the writ should be dismissed because the intervening change in the National Security Act eliminates the problem which justified issuance of the writ. Alternately, the decision below should be affirmed insofar as it pertains to the identities of the principal researchers and reversed insofar as it pertains to the institutions.

Respectfully submitted,

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